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In the Supreme Court of the United States

OCTOBER TERM, 1979

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

THE COUNTY OF LOS ANGELES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., PETITIONERS*

v.

THE COUNTY OF LOS ANGELES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether this suit, which seeks a declaratory judgment that the provisions of the Federal Unemployment Tax Act providing for the extension under state law of unemployment compensation coverage to state and local government employees (26 U.S.C. 3301 *et seq.*) violate the Tenth Amendment, and an injunction against the assessment and collection of federal unemployment taxes, is barred by the Declaratory Judgment Act (28 U.S.C. 2201–2202) and the Anti-Injunction Act (26 U.S.C. 7421(a)).

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* In addition to the Secretary of Labor, petitioners include the Secretary of the Treasury and the Commissioner of Internal Revenue. A list of the respondents has been lodged with the Clerk by petitioners in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

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The Solicitor General, on behalf of the Secretary of Labor, the Secretary of the Treasury, and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case, if the Court grants the petition for a writ of certiorari which respondents, the County of Los Angeles, *et al.*, filed in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 32a-45a)[1] is reported at 442 F. Supp. 1186. The district court's order of dismissal (Pet. App. 29a-31a) is unreported. The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980 (Pet. App. 7a). On June 4, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 3310 and 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.) and the Declaratory Judg-

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[1] "Pet. App." refers to the appendix to the petition in *The County of Los Angeles* v. *Marshall*, No. 79-1965.

ment Act (28 U.S.C. 2201-2202) are set forth in the Appendix, *infra*, 1a-3a.

STATEMENT

Respondents are seven states and approximately 1,750 political subdivisions. They brought this action in the United States District Court for the District of Columbia seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, which provide for the extension under state law of unemployment compensation to state and local government employees, are unconstitutional. These amendments provide for denial of tax credits against federal unemployment tax for private employers within a state which fails to extend unemployment compensation to its employees. Respondents also sought an injunction restraining the termination of tax credits for private employers and termination of federal grants that otherwise would result in states which refused to enact legislation conforming to the 1976 federal amendments (Pet. App. 32a-35a).

The statutory provisions at issue in this case operate as follows: Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31st. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and federal grants of money.

Section 3301 presently imposes a tax on most private employers equal to 3.4 % of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In Any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide, for example, job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 50a-55a) to require, as a con-

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1),(c), and (d)(1).

[5] See Sections 301-303 of the Social Security Act, 42 U.S.C. 501-503.

[6] See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

dition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as state law covers private employees. These amendments apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed this suit for lack of jurisdiction (Pet. App. 29a-31a). It ruled that because the objective of respondents' action was to enjoin the denial of Federal Unemployment Tax credits to employers located in states whose unemployment compensation laws do not conform to the requirements of the 1976 amendments, the suit was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. In its view, respondents did not demonstrate that they were likely to succeed on the merits or that they would sustain irreparable injury in the absence of an injunction (Pet. App. 35a-45a). The district court also observed that respondents had an adequate remedy at law. Pursuant to 26 U.S.C. 3310 (Appendix, *infra*, 1a-2a), any state that the Secretary of Labor determines not to be in conformity with the 1976 Amendments is entitled to seek judicial review of the Secretary's decision, and a stay of the Secretary's decision, in the court of appeals, and ultimately in this Court (Pet. App. 36a-37a).

The court of appeals affirmed per curiam the district court's dismissal of the complaint (Pet. App. 1a-6a). It did not, however, address the jurisdictional questions. Instead, it followed the decision of the First Circuit in

State of New Hampshire Dept. of Employment Security v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79-1846 (filed May 20, 1980), in which the State of New Hampshire advanced the same constitutional challenge to the 1976 Amendments to the Federal Unemployment Tax Act. As the court of appeals noted, "the First Circuit addressed the Tenth Amendment contention and concluded that it was unavailing. We agree with the constitutional determination so made by the First Circuit, and adopt its reasoning as fully applicable to the consolidated appeals before us" (Pet. App. 5a; footnote omitted). Like the First Circuit, the court of appeals held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), is distinguishable because conformity with the 1976 Amendments is "voluntary and wholly optional" (Pet. App. 6a).

REASONS FOR GRANTING THE PETITION

Respondents have filed a petition for a writ of certiorari in No. 79-1965, seeking review of the decision below holding that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment rights of the states. We intend to oppose that petition. If that petition is granted, however, the Court should also grant the present petition in order to preserve the federal petitioners' right to defend the court of appeals' judgment on the basis of the alternative jurisdictional contentions not addressed by that court.[7]

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[7] Although it would appear that a cross-petition is not necessary in order to raise an argument which does not seek to alter

1. The Anti-Injunction Act, 26 U.S.C. 7421(a), generally, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." That statute bars this suit because respondents seek to restrain the government from denying FUTA tax credits to private employers for their contributions to state unemployment funds in states that fail to enact and retain unemployment compensation coverage for state and local government employees. In essence, therefore, this is a suit to restrain the assessment and collection of a tax. Further, the decisions of this Court establish beyond question that the constitutional nature of respondents' claim does not circumvent the bar of the Anti-Injunction Act. See *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752, 759–760 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 11 (1974).

As this Court has held, the sole and exceedingly narrow exception to the Anti-Injunction Act is that an

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the judgment of the court of appeals, we are filing this conditional cross-petition out of an abundance of caution. *E.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); see *Langnes* v. *Green*, 282 U.S. 531 (1931). Cf. *Strunk* v. *United States*, 412 U.S. 434 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 & n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, a cross-petition would not appear to be necessary where the objection to be raised is that the lower courts had no jurisdiction to consider the case. See *Peoria Ry.* v. *United States*, 263 U.S. 528, 535–536 (1924); *Mattingly* v. *N.W. Virginia R.R.*, 158 U.S. 53, 57 (1895). See also *Matson Nav. Co.* v. *United States*, 284 U.S. 352, 359 (1932); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 125 (1804).

injunction may issue only when (a) "under the most liberal view of the law and the facts, the United States cannot establish its claim," and (b) irreparable injury will occur in the absence of an injunction. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7 (1962), reaffirmed in *Bob Jones University* v. *Simon*, 416 U.S. 725, 742-746 (1974).

Respondents' suit fails both tests. This Court has ruled that federal grants and tax credits of the same character as those here are not coercive and do not intrude upon state sovereignty. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-593 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). Thus, it cannot be suggested that "under the most liberal view of the law," the government cannot succeed on the merits of its claim. Nor have respondents alleged the requisite irreparable injury—*viz.*, injury without adequate legal remedy. A suit for refund affords private employers a full opportunity to litigate the constitutionality of the tax. *Commissioner* v. *"Americans United" Inc.*, *supra*, 416 U.S. at 761-762. See, *e.g.*, *Steward Machine Co.*, *supra*.

Moreover, the affected states have an adequate remedy at law insofar as they are able to seek review of the Secretary of Labor's adverse determination. Congress has provided for judicial review of the Secretary's decision not to certify the laws of a state as conforming to the 1976 Amendments to the Federal Unemployment Tax Act. See Section 3310 of the Internal Revenue Code (Appendix, *infra*, 1a-2a), which provides for review by the appellate courts and this Court of any determination by the Secretary to

withhold a state's certification. Furthermore, Section 3310(d) explicitly states that the Secretary may not withhold certification until after exhaustion of the time to petition for review, and that the courts "may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights." Congress thus has established a method for judicial review specifically tailored to the question of state certification, which adequately protects the interests of the state. Indeed, in *State of New Hampshire, supra*, a state has advanced the identical constitutional challenge as respondents and the Secretary's 1978 decertification decision was stayed pending review by the court of appeals.[8] Respondents should not be able to bypass the established review procedures and then invoke the district court's general equity jurisdiction. The district court below correctly held that the Anti-Injunction Act bars this suit.

2. The district court also correctly held that this suit also is barred by the tax exception to the Declaratory Judgment Act (Appendix, *infra*, 3a). With one exception not pertinent here, that Act bars declaratory suits "with respect to Federal taxes." Respondents seek a declaratory judgment respecting the federal unemployment tax liability of private employers who are not even parties. As this Court has observed, the bar of the tax exception to the Declaratory Judgment Act

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[8] Of all the states, New Hampshire alone failed to enact legislation conforming its unemployment compensation law to the requirements of the 1976 Amendments.

against such suits is at least as broad as the Anti-Injunction Act. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 732-733 n.7.

CONCLUSION

The petition for a writ of certiorari should be granted if the Court grants the petition filed by respondents in No. 79-1965. If the Court denies that petition, it should also deny this petition.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3310. JUDICIAL REVIEW.

(a) *In General.*—Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary of Labor. The Secretary of Labor thereupon shall file in the court the record of the proceedings on which he based his action as provided in section 2112 of title 28 of the United States Code.

(b) *Findings of Fact.*—The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary of Labor to take further evidence, and the Secretary of Labor may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) *Jurisdiction of Court; Review.*—The court shall have jurisdiction to affirm the action of the Secretary of Labor or to set it aside, in whole or in part. The judgment of the court shall be subject to

review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) *Stay of Secretary of Labor's Action.*—

(1) The Secretary of Labor shall not withhold any certification under section 3303(b) or section 3304(c) until the expiration of 60 days after the Governor of the State has been notified of the action referred to in subsection (a) or until the State has filed a petition for review of such action, whichever is earlier.

(2) The commencement of judicial proceedings under this section shall stay the Secretary of Labor's action for a period of 30 days, and the court may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights.

(e) *Preference.*—Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary of Labor or the State, shall receive a preference and shall be heard and determined as expeditiously as possible.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

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28 U.S.C.:

SEC. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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